United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

To Be Argued By
ARTHUR M. BOAL

ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRUIT

75-7439

NATIONAL STARCH & CHEMICAL CORPORATION,

Plaintiff-Appellee,

-against-

SS HERMIONE, her engines, boilers, etc.,
APOLLO SHIPPING CO.,

Defendants,

-and-

AMBER MARITIME CORP.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

APPELLANTS' BRIEF

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-and-

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----------x

BRIEF FOR THE DEFENDANT-APPELLANT

NATURE OF THE CASE

This is an appeal from a judgment of the District Court in favor of the Appellee for shortage of and damage to a cargo of tapioca flour shipped from Bangkok, Thailand to Philadelphia and Baltimore. The Appellee purchased the cargo ex-dock though it did insure it under its blank marine policy. It never owned the bills of lading. It took delivery and title on the dock.

THE PLEADINGS

The Appellee alleges in its complaint: (6a)*

"SEVENTH" Plaintiff was the shipper, consignee or owner of the shipment as described in Schedule A and brings this action on its

* All references to page numbers are those in the appendix.

own behalf and, as agent and trustee, on behalf of and for the interest of all parties who may be or become interested in the said shipment, as their respective interests may ultimately appear, and plaintiff is entitled to maintain this action.

SCHEDULE A: Nature of Loss or Damage:

Short-delivery and damage/slackage to above described shipment under Bs. 1, 3, 4 and 6.

TITLE TO THE CARGO
(Exhibit 2-91a)*

The Appellee entered into three identical contracts with Tapioca Associates, Inc. for the purchase of tapioca flour. The three contracts are dated March 24, 1972 and are identical. They provide

"No arrival - no sale.

* * *

Except as otherwise provided the usual ex dock terms to apply."

An agreement was made by letter dated August 23, 1972 which provided: (Exhibit 7- 93a)

"It is agreed that the destination of the above mentioned shipments is to be Philadelphia/Camden, and further that National Starch and Chemical Corporation will bind all risk coverage under their open marine and war risk insurance policy to include American Institute Clause from 'warehouse to warehouse' for the above shipments upon declaration at the ex-dock value. In event of loss due to marine or war risk perils, resulting in non-delivery, Tapioca Associates, Inc. will be paid versus shipping documents."

Mr. Miller, a witness for the Appellee testified: (38a)

Q. Mr. Miller, the shipper of these goods sent bills of lading through its bank to Tapioca Associates, didn't they ?
A. Yes, they did.

Q. And you picked them up from the bank; is that right ?
A. Yes, we did.

Q And what did you do with them after you got them from the bank ?
A We surrendered them to the steamship company for a delivery order of the goods in due course.

Mr. Miller also testified that the bills of lading were endorsed by Thai Tapioca, Ltd., the shipper, by Tapioca Associates, Inc. and forwarded to Morris Friedman & Co., its agents in Philadelphia, who cleared them through Customs and issued delivery orders to the Appellee. The same functions were performed in Baltimore by William H. Masson & Co. as agents for Tapioca Associates, Inc.

The Appellee was never at any time the owner or holder of the bills of lading nor an assignee of the owner or holder.

The sale was treated by the parties as ex-dock. Title passed to the Appelee when it took delivery on the docks at Philadelphia and Baltimore.

DAMAGE TO CARGO

The tapioca was in 100 pound bags. These bags were stowed in pallets with 25 bags to the pallet. They were described

by the Appellee's surveyor as follows:(13a)

> "Our examinations revealed the shipments to consist of the normal 6 ply kraft paper bags, machine sewn over reinforcing tape at the top and bottom with each bag weighing 100 pounds net.
> "The bags were originally stacked on pallets in 6 tiers of 4 bags each leaving an open space in the center in which an additional bag was placed. Each pallet load, therefore, consisted of 25 bags.
> "The pallets were satisfactorily constructed of 1"x3" and 2 3/4" x 3" lumber. The palletized units measured 48" x 43" x 48" and were covered with double-faced corrugated fibreboard on the tops and two sides. The other 2 sides were partly covered at the top. Each palletized unit had the bags secured horizontally with two 5/8" plastic straps."

The vessel encountered heavy weather on several occasions which measured 8 and 10 on the Beaufort scale which caused rolling and pitching of the vessel. This caused the bags to slip out of their pallets which in turn caused tears in the bags and the spilling of contents.

The Appellee, National Starch & Chemical Corporation offered the testimony of William Miller, vice-president of Tapioca Associates, Inc. who testified that the pallets were covered with fiberboard on four sides. When asked how these bags were secured within the pallets Mr. Miller testified that they were glued: (41a).

> "They were glued to the pallet and to each other all the way up to make a monolithic block."

Mr. Miller did not see the cargo loaded and only testified

as to what he expected to be done, not what was actually done.

Mr. Horger, Appellant's surveyor, who examined the cargo in Philadelphia, found fiberboard on two sides with two sides open as did the Appellee's surveyor in Baltimore. Mr. Horger said he found no glue on any of the bags and Appellee's surveyor did not mention any.

Mr. Horger as a witness for the Appellant testified:(68a)

Q Was there any room in these pallets for cargo to shift with the rolling and pitching of the ship ?
A In so much as the bags are not secured to the pallet and the pallet can assume the angle of the vessel while she is rolling perhaps thirty or forty degrees with six or seven second snaps, it is my opinion that the pallet at that angle there is nothing to keep bags from going adrift of the pallet or moving from the pallet in so much as they are not secured to the pallet.

* * *

Q Were any of them protruding from the pallet when you examined them ?
A Yes, sir, many were telescroped, the entire six tiers of bags were leaning from the pallet.

* * *

In reference to the difficulty he said: (70a)

"There was no glue apparent either in the remaining bags in the vessel or on the bags that I surveyed in the pier shed."

THE OTHER SUIT ON THE SAME BILLS OF LADING

Tapioca Associates, Inc. brought a suit in the Eastern

District of New York for failure by the carrier to perform its obligation under the same bills of lading, viz. 1, 3, 4 and 6. In that suit Tapioca Associates claimed that the bills of lading were violated by discharging only part of the cargo in Philadelphia and carrying of a part of it to Baltimore. They asked for damages because of the extra expense caused by the delivery in Baltimore. That case was decided in favor of the carrier and the action dismissed.

A MOTION WAS MADE TO TRANSFER THIS CASE TO THE EASTERN DISTRICT OF NEW YORK

Prior to the trial of the case in the Eastern District Appellee moved to transfer this case to the Eastern District of New York. In his affidavit in support of the motion counsel for the Appellee stated: (14a)

> "This is an action for shortage of and damage to cargo brought in the name of the consignee who purchased the cargo in question from Tapioca Associates, Inc. The suit was brought by National Starch & Chemical Corporation according to Paragraph 7 of the complaint 'on its own behalf and, as agent and trustee, on behalf of and for the interest of all parties who may be or become interested in the said shipment ..... .' "

and it refers specifically to the bills of lading, No. 1, 3, 4 and 6.

In opposition to this motion to transfer counsel for the Appellant stated: (a).

"This is a case for shortage of and damage to cargo shipped on the SS HERMIONE under four bills of lading. The goods in question were sold by Tapioca Associates, Inc. to the plaintiff ex-dock and were not owned by the plaintiff prior to delivery by the carrier to the person entitled to receive them under the bills of lading.

"In paragraph 3 of the amended complaint of Tapioca Associates, Inc. against Amber Maritime Corp., Amber Asia Corporation and Apollo Shipping Corp. and M.V. HERMIONE, in the United States District Court for the Eastern District of New York, it is alleged:

> 'The plaintiff was the owner of the cargo described below up to the time the cargo described below was picked up by the purchaser, National Starch & Chemical Corporation ('National'), at the dock in Philadelphia, Pennsylvania and Baltimore, Maryland.'

* * *

"That suit does not involve in any way the damage to cargo. None is claimed. That case has been set for trial by Judge Bartels for Tuesday, August 6th, at 10 A.M. The defendant will not be prepared at that time to try the issue of damage to this cargo. The issues in these two cases are entirely separate and distinct and no advantage will be obtained by having them tried at the same time and before the same judge."

THE PRE-TRIAL ORDER

The position of the parties is stated in the pre-trial order as follows: (20a)

"(b) It is plaintiff's contention that defendant Amber Maritime Corporation were negligent in failing to deliver the commodities described in the four bills of lading as referred to in C above in the same apparent good order and condition as when received at Bangkok and that said defendant thereby breached the terms and conditions of the bill of lading. Plaintiff contends that the bags of tapioca were broken, many were severely torn, and partly or almost entirely empty, contaminated with filth, and short entire bags.

(c) The defendant contends that the plaintiff was not a party to the bills of lading and never owned the bills of lading under which this cargo was carried. It purchased the cargo ex-dock and had no title to the cargo until it took delivery on the dock at Philadelphia and Baltimore. Amber Specifically contents:

> This tapioca was purchased by National Starch from Tapioca Associates under contracts Nos. 1617A, 1619A and 1620. These contracts provide
>
> "1. No arrival - no sale * * *"
>
> "Except as otherwise provided the usual ex-dock terms are to apply,"

THE OPINION OF THE COURT

The Court stated in its opinion: (119a).

> "Thai Tapioca, Ltd. of Baugkok there delivered to the vessel the merchandise, for which four clean bills of lading were issued by the defendant to the order of Thai Tapioca, which endorsed them to an affiliate, Tapioca Associates.

Long prior to the shipment, on March 24, 1972, Tapioca Associates agreed to sell the merchandise to the plaintiff, ex-dock. On August 23, 1972 the contract between Tapioca Associates and plaintiff was modified by a writing which provided that National Starch & Chemical Corporation was to secure 'risk coverage under (its) open marine and war risk insurance policy ... for the above shipments upon declaration at the ex dock value.' Their arrangement further provided: 'In event of loss due to marine or war risk perils, resulting in non-delivery, Tapioca Associates, Inc. will be paid versus shipping documents.'

"On arrival of the goods in the United States in November 1972 they were outturned at two ports, Philadelphia and Baltimore. Tapioca Associates endorsed the bills of lading to its forwarding agents, who surrendered them to the carrier, together with an order to deliver the merchandise to National Starch & Chemical Corporation. It is not disputed that a portion of the cargo was damaged and also that there was nondelivery of another portion. The parties have stipulated as to the damages for these items. What is at issue is plaintiff's right to recover the damages. The defendant contends that plaintiff was not the owner or holder of the bills of lading at any time, and was not the owner of the tapioca flour at the time it is claimed it was damaged, and accordingly is not entitled to recover.

"While it is true that the bills of lading were not formally endorsed or assigned to plaintiff, it is clear that at all times, even before the issuance of the bills of lading, plaintiff, as the purchaser of the yet to be delivered shipment, was the beneficial owner thereof. This is underscored by the August 23 letter agreement between plaintiff, as purchaser, and Tapioca Associates, as seller of the shipment. The terms of that agreement provided that plaintiff was to be obligated for the full purchase price regardless of the condition of the goods upon delivery, plaintiff was to bear the risk of any damage to the goods during transit, and

plaintiff, not the seller (as usually is the case in an ex dock sale), was to insure against that risk. Under this arrangement, even if plaintiff was not the formal holder of legal title, it was at least the equitable or beneficial owner and is entitled to maintain the action against the carrier for the loss sustained.

* * *

"The defendant makes a further contention that plaintiff is barred from recovery in this action by reason of a judgment entered in an action brought in the Eastern District court by Tapioca Associates against the defendant herein, the carrier, to which action plaintiff here was not a party, to recover the increased trucking charges made necessary when the cargo was unloaded at a port other than that originally designated. This plea must fail in the light of defendant's own position in opposing consolidation of this action with the Eastern District action. The defendant expressly acknowledged that"(t) hat suit (The Eastern District action) does not involve in any way cargo damage ... . The issues in these two cases are entirely separate and distinct and no advantage will be obtained by having them tried at the same time and before the same judge."

* * * *

"The defanse of inadequate packaging does not affect plaintiff's claim of nondelivery, it only relates to the claim for damage to delivered goods. Plaintiff's and defendant's witnesses differed as to whether the palletized tapioca was covered on the top and all four sides with fiberboard, whether there were vertical posts at the four corners of the pallet, and whether the bags of tapioca were glued to each other and to the floor of the pallet. Photographs admitted into evidence support the defendant's position that two sides of most pallets were substantially exposed, although all edges were protected by fiberboard. But even accepting this fact, and assuming that the pallets did not have posts

at each corner and that the bags were not glued in any way, it does not follow that the packaging was inadequate. The defendant's witness, a marine surveyor, testified that shippers of tapioca at the time alternated between a four-sided package and a two-sided package, and that he had seen other shipments packed the same way that outturned without damage. There was a lack of competent proof that the manner of packing was the cause of the damage."

SUMMARY OF ARGUMENT

The Appellee was not the owner or holder of the bills of lading under which the cargo here involved was carried from Bangkok to Philadelphia and Baltimore. The Appellee entered into three contracts of purchase from Tapioca Associates, Inc., all dated March 24, 1972 and all identical. These contracts provided: (Exhibit 2 - 91a)

> "No arrival - no sale.
>
> "Except as otherwise provided the usual ex-dock terms to apply."

A letter was written dated August 23, 1972 in which the Appellee agreed to put the cargo under its open marine policy. It also provided: (Ex. 7 -93a).

> "In the event of loss due to marine or warrisk perils resulting in non-delivery Tapioca Associates, Inc. will be paid versus shipping documents".

Tapioca was shipped by Thai Tapioca, Ltd. at Bangkok. Bills of lading were issued to the order of the shipper. These

were forwarded by the shipper to its New York bank where Tapioca Associates obtained them. The bills of lading were forwarded by Tapioca Associates to its agents in Philadelphia, Morris Friedman & Co. with instructions to clear the cargo through customs, deliver the bills of lading to the carrier and issue delivery orders to the Appellee. This they did so far as any cargo discharged at Philadelphia was concerned. At Baltimore the cargo was cleared through customs by the agents of Tapioca Associates, Inc. and these agents in turn issued a delivery order to the Appellee.

The Court stated in its opinion: (119a),

> "Thai Tapioca, Ltd. of Bangkok there delivered to the vessel the merchandise, for which four clean bulls of lading were issued by the defendant to the order of Thai Tapioca, which endorsed them to an affiliate Tapioca Associates."

The Court also found: (120a)

> "While it is true that the bills of lading were not formally endorsed or assigned to plaintiff, it is clear that at all times, even before the issuance of the bills of lading, plaintiff, as the purchaser of the yet to be delivered shipment, was the beneficial owner thereof."

The Appellee could get title to this tapioca only from Tapioca Associates. Tapioca Associates did not acquire title until it picked up the bills of lading at the bank of the shipper in New York. The Appellee could not possibly have acquired title, beneficial or otherwise, prior to the time that title

was obtained by Tapioca Associates.

The agreement of August 23, 1972 under which the Appellee undertook to put this cargo under its blank marine insurance policy did not give the Appellee title to the goods either legal or equitable. In reference to the letter of August 23rd the Court stated: (Exhibit 7 - 93a).

> "The terms of that agreement provided that plaintiff was to be obligated for the full purchase price regardless of the condition of the goods upon delivery, plaintiff was to bear the risk of any damage to the goods during transit, and plaintiff, not the seller (as usually is the case in an ex dock sale), was to insure against that risk."

The contract provided only for payment in case of non-delivery against shipping documents. There was no agreement that the purchaser had to accept the goods on the dock regardless of their condition.

No payment was made against the shipping documents. The goods were delivered to the Appellee on delivery orders on the dock in Philadelphia and Baltimore. The parties considered their agreement to provide that title should pass on the dock under the usual terms of an ex-dock sale. This is described in 10 Williston on Contracts, 3rd Edition, Sec.1080-A, page 115: It provides

> Buyer must
>
> (1) take delivery of the goods on the dock at the named port of importation within the free time allowed;

(2) bear the cost and risk of the goods if delivery is not taken within the free time allowed.

The damage to this cargo was due to the inadequate packaging. These bags were in pallets, 25 bags to a pallet. There were four bags in a tier, six tiers high with a bag standing on end in the center. There was fiberboard on two sides and on the top. The other two sides were open. The bags were not secured to the pallet and when the vessel rolled and pitched in heavy weather some of the bags slipped out of the pallets and sustained damage.

Mr. Miller, vice president of Tapioca Associates, Inc. testifying for the plaintiff said there was fiberboard on four sides and the bags were glued together so that they formed a solid mass. Mr. Miller did not see the cargo at the loading port and made only a casual inspection in Philadelphia. Mr. Horger, Appellant's surveyor, said that two sides were not covered by fiberboard and the bags were not glued. He was corroborated by the surveyor for the Appellee, Theodore Helprin, who made no mention of any glue and stated there was fiberboard only on two sides.

The Court in disposing of this point stated:(126a)

"*** assuming that the pallets did not have posts at each corner and that the bags were not glued in any way, it does not follow that the

> packaging was inadequate. The defendant's witness, a marine surveyor, testified that shippers of tapioca at the time alternated between a four-sided package and a two-sided package, and that he had seen other shipments packed the same way that outturned without damage."

Mr. Horger did testify that the bags did slip out of their pallets and did sustain damage and they would not have slipped out of their pallets had there been fiberboard on four sides. The amount of the damage which was due to inadequate packaging was $3,148.08.

This action is barred by the decision of the District Court for the Eastern District of New York in the case of Tapioca Associates, Inc. against the Appellant. Tapioca brought an action on these very bills of lading against the defendant. That case was dismissed and the decision against Tapioca Associates precludes the Appellee from exercising any rights on these bills or lading which it in any way derived from Tapioca Associates. All claims for failure to carry out the terms of those bills of lading were ended by the judgment of the District Court for the Eastern District of New York. (Baltimore Steamship Co. vs. Phillips, 274 U.S. 316; Baird vs. U. S. 96 U. S. 430).

ARGUMENT

POINT I

THE APPELLEE DID NOT HAVE TITLE TO THE TAPIOCA UNTIL IT TOOK DELIVERY ON THE DOCKS IN PHILADELPHIA AND BALTIMORE

The bills of lading Nos. 1, 3, 4 and 6 all are to the order of the shipper Thai Tapioca, Ltd. They were endorsed by the shipper and sent to the shipper's bank in New York. There Tapioca Associates secured the bills of lading from the shipper's bank. There is no evidence in the record as to the time when this happened.

Tapioca Associates did not deliver the bills of lading to the Appellee but endorsed them and sent them to its forwarding agent in Philadelphia, Morris Friedman Co. who in turn delivered them to the carrier (the Appellant) and issued delivery orders to the Appellee.

Tapioca Associates' agents in Philadelphia and Baltimore cleared the tapioca through Customs naming Tapioca Associates as the owner and importer.

The District Court in its opinion states: (119a)

> "Thai Tapioca, Ltd. of Bangkok there delivered to the vessel the merchandise, for which four clean bills of lading were issued by the defendant to the order of Thai Tapioca, which endorsed them to an affiliate, Tapioca Associates."

This reference to Tapioca Associates as an affiliate of the shipper Thai Tapioca, Ltd. is without any support and the evidence is all to the contrary. That erroneous assumption was the basis of the court's decision because he states later: (120a).

> "While it is true that the bills of lading were not formally endorsed or assigned to plaintiff, it is clear that at all times, even before the issuance of the bills of lading, plaintiff, as the purchaser of the yet to be delivered shipment, was the beneficial owner thereof."

The Appellee could not be the beneficial owner of this cargo prior to the time that Tapioca Associates obtained title to it and title was not obtained by Tapioca Associates until it paid the drafts to which the bills of lading were attached at the bank of the shipper in New York.

Mr. Miller, testifying as a witness for the Appellee stated: (38a).

Q Mr. Miller, the shipper of these goods sent bills of lading through its bank to Tapioca Associates, didn't they ?
A Yes, they did.

Q And you picked them up from the bank, is that right ?
A Yes, we did.

Q And what did you do with them after you got them from the bank ?
A We surrendered them to the steamship company for a delivery order of the goods in due course.

Mr. Miller also testified that Morris Friedman & Co. was its freight forwarder in Philadelphia and William Masson & Co.

was its freight forwarder in Baltimore, and both were instructed to clear the tapioca through Customs and the Food and Drug Administration.

Tapioca Associates acted as the owner of these goods until delivery was made to National Starch on the docks in Philadelphia and Baltimore. This is shown by their clearing them through Customs as the owner and importer and delivering the bills of lading to the carrier (the Appellant) and issuing delivery orders to the Appellee (National Starch).

POINT II

THE APPELLEE DID NOT ACQUIRE ANY RIGHTS TO SUE ON THESE BILLS OF LADING FROM TAPIOCA ASSOCIATES, INC.

The Appellee alleges in its complaint: (7a)

> "SEVENTH: The plaintiff was the shipper, consignee or owner of the shipment as described in Schedule A and brings this action on its own behalf and, as agent and trustee, on behalf of and for the interest of all parties who may be or become interested in the said shipment, as their respective interests may ultimately appear, * * *."

It is clear that the Appellee was not the shipper or consignee or owner of the bills of lading.

The Appellee cannot bring this suit on behalf of Tapioca Associates, Inc. the owner of the tapioca.

Tapioca Associates brought a suit on these same bills of leading in the United States District Court for the Eastern

District of New York against the Appellant and in that suit alleged: (Exhibit A - 99a).

> "9. On or about September 9, 1972, there was loaded on the M/V HERMIONE approximately 1022 pallets of bagged tapioca at Bangkok which the defendants agreed to carry from Bangkok to Camden, New Jersey under and pursuant to bills of lading BCD 1, 3, 4 and 6.
>
> "10. Subsequently, the defendants delivered part of the shipment to Philadelphia and part to Baltimore, not to Camden, New Jersey, in contravention of the terms of the bill of lading described in paragraph 9 of this complaint.
>
> "11. As a result of this breach of contract, the plaintiff incurred a freight differential payment, additional freight forwarding charges and other expenses for which the defendants are responsible."

Tapioca Associates in that case took the position that it was the owner of the bills of lading and had title to the cargo during the entire time it was in possession of the carrier.

The case was tried before Judge Bartels, who stated in his opinion: (107a).

> "On September 6, 1972 Amber Asia contracted with Tapioca to transport, on the M/V HERMIONE, approximately 1338 tons of tapioca flour from Thailand to the United States, the terms of delivery being ex-dock at either Philadelphia, Pennsylvania, or Camden, New Jersey, at the carrier's option. In turn, Tapioca contracted for the sale of this flour to National Starch & Chemical Company ('National'), a New Jersey corporation with its place of business at Finderne, New Jersey. Under this contract National was required to accept delivery of this flour ex-dock

in either Philadelphia or Camden and transport it, at its own expense to Finderne, New Jersey."

Later in his opinion Judge Bartels stated: (112a)

"This contract of carriage entered into by Tapioca and Amber Asia dated September 6, 1972 provides that the 'cargo is to be loaded, stowed, carried, discharged and delivered in accordance with U.S. Law pertaining to the Carriage of Goods by Sea Act in effect at the time'."

Then Judge Bartels held that because of the longshoremen's wildcat strike the carrier was justified in carrying the tapioca on to Baltimore and he entered a judgment for the defendant.

Tapioca Associates had a single cause of action for breach by the carrier of its obligations under the bills of lading. It could have included in that cause of action items for non-delivery of and damage to cargo. Having failed to do so those items cannot be included in another suit on those same bills of lading. Tapioca Associate's rights were extinguished and there is nothing that the Appellee can claim as a right derived from or assigned to it by Tapioca Associates.

In Baltimore Steamship Co. vs. Phillips, 274 U.S. 316, a seaman filed a libel in admiralty for injuries. He was denied a recovery for injuries due to negligence. The District Court had held that the Jones Act did not apply in admiralty. No appeal was taken from the judgment of the District Court, but an action at law was started in the Eastern District of

New York. In that case a decree of resjudicata was entered and denied and the judgment was affirmed on appeal. The Supreme Court in reversing stated:

> "The effect of a judgment or decree as res judicata depends upon whether the second action or suit is upon the same or a different cause of action. If upon the same cause of action, the judgment or decree upon the merits in the first case is an absolute bar to the subsequent action or suit between the same parties or those in privity with them, not only in respect of every matter which was actually offered and received to sustain the demand, but also as to every ground of recovery which might have been presented. But if the second case be upon a different cause of action, the prior judgment or decree operates as an estoppel only as to matters actually in issue or points controverted, upon the determination of which the judgment or decree was rendered. Cromwell vs. County of Sac, 94 U.S.351, 352-353; United States v. Moser, 266 U.S. 236, 241. There is some confusion in the decisions as to whether the present case should fall within the first or the second branch of the rule, but we are of the opinion that the great weight of authority, both in respect of the number of decisions and upon reason, sustains the view that the facts here gave rise to a single cause of action for damages and that the first branch of the rule applies. In United States vs. California & Ore. Land Co., 192 U.S. 355, this court announced the general rule to be that a judgment or decree upon the merits concludes the parties as to all media concludent or grounds for asserting the right, known when the suit was brought. In that case a bill had been brought to have certain patents for land issued by the United States declared void on the ground that the lands were within an Indian reservation, and therefore, reserved from the operation of the grant. The land compampany pleaded in bar that the United States had filed

> an earlier bill seeking the same relief and that a final decree had been entered dismissing that bill. The only thing which the court could find to distinguish the two suits was that in the latter the United States had put forward a new ground for its prayer, but in both cases it sought to establish its own title to the fee. This court sustained the plea in bar, saying, 'But the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He cannot even split up his claim, Fetter vs. Beale, 1 Salk. 11; Trask vs. Hartford & New Haven Railroad, 2 Allen, 331; Freeman, Judgments, 4th ed. Sec.238, 241; and, a fortiori, he cannot divide the grounds of recovery."

In Baird vs. U.S., 96 U.S.430, the plaintiff had built engines for the government and compensation was based upon various elements. Payment was made by the Government and then suit was brought in the Court of Claims for the residue and judgment was obtained for $23,750. Later the plaintiff brought another suit for additional items, totalling $38,617.04. This second suit was held barred. The Court stated:

> "It is well settled that where a party brings an action for a part only of an entire indivisible demand and recovers judgment, he cannot subsequently maintain an action for another part of the same demand (Warren vs.Commings, 6 Cush. (Mass) 103) Thus if there are several sums due under one contract and a suit is brought for a part only, judgment in that suit will bar another action for the recovery of the residue."

The Court stated in SECO v. STURGIS, 16 N.Y. 548:

> "This rule goes against several claims growing out of the same wrong and against several claims on the same contract."

The lower court did not deal directly with the question of a split cause of action. He states: (123a)

> "The defendant makes a further contention that plaintiff is barred from recovery in this action by reason of a judgment entered in an action brought in the Eastern District Court by Tapioca Associates against the defendant herein, the carrier, to which action plaintiff here was not a party, to recover for increased trucking charges made necessary when the cargo was unloaded at a port other than that originally designated. This plea must fail in the light of defendant's own position in opposing consolidation of this action with the Eastern District action. The defendant expressly acknowledged that 'that suit (the Eastern District action) does not involve in any way cargo damage .... The issues in these two cases are entirely separate and distinct and no advantage will be obtained by having them tried at the same time and before the same judge.' "

In opposition to the motion to transfer counsel for the Appellant stated in his affidavit: (17a)

> "This is a case for shortage of and damage to cargo shipped on the SS HERMIONE under four bills of lading. The goods in question were sold by Tapioca Associates, Inc. to the plaintiff ex-dock and were not owned by the plaintiff prior to delivery by the carrier to the person entitled to receive them under the bills of lading.
>
> "In Paragraph 3 of the amended complaint of Tapioca Associates, Inc. against Amber Maritime Corp. Amber Asia Corporation and Apollo Shipping Corp. and M/V HERMIONE, in the United States District Court for the Eastern District of New York, it is alleged:
>
> > 'The plaintiff was the owner of the cargo described below up to the time the cargo described below was picked up by the purchaser, National Starch & Chemical Corporation

('National'), at the dock in Philadelphia, Pennsylvania and Baltimore, Maryland.'

"It is also alleged in that complaint that part of the cargo was discharged in Philadelphia and part in Baltimore and sought to recover from the carrier the extra cost of transporting the cargo from Baltimore to its destination over what would have been the cost from Philadelphia.

"That suit does not involve in any way the damage to cargo. None is claimed. T hat case has been set for trial by Judge Bartels for Tuesday, August 6th at 10 A.M. The defendant will not be prepared at that time to try the issue of damage to this cargo. The issues in these two cases are entirely separate and distinct and no advantage will be obtained by having them tried at the same time and before the same judge."

In the action in the Eastern District Tapioca Associates alleged they were the owner of this cargo until it was picked up by the purchaser, National Starch, at the docks in Philadelphia, Penna. and Baltimore, Maryland. If the case had been transferred to the Eastern District the issues would have been the same. It could only have been changed by Tapioca Associates amending their complaint to include claims for damage to cargo and for non-delivery and that they did not do.

One argument against transfer was that the case in the Eastern District was set for trial on August 6th and the parties were ready for trial at that time but were not ready to try the claims for damage and shortage.

The fact that the defendant would not be subject to a double recovery does not change the rule. The rule is that a cause of action must be tried once in full and not piecemeal. This the Supreme Court has already set forth. There was no possibility of a double recovery in Baltimore Steamship Co. vs. Philips (supra) or in Baird vs. U.S. (supra) yet the second suit was held barred in each case.

Whatever rights Tapioca Associates had against the Appellant under bills of lading Nos. 1, 3, 4 and 6, ended with the judgment of the Eastern District Court. The Appellee acquired nothing from Tapioca Associates. It had no assignment from Tapioca Associates and had no authority from Tapioca Associates to sue in its behalf as trustee or in any capacity. It had no authority from any other source to sue under these bills of lading or for damage to this cargo.

POINT III

THE APPELLEE WAS IN NO WAY ENTITLED TO SUE THE APPELLANT FOR DAMAGE TO OR SHORTAGE OF CARGO.

As heretofore pointed out the Appellee acquired no right to sue Appellant because it had no title to the goods until it took delivery on the dock. It was at no time the owner of the bills of lading. It acquired nothing from Tapioca Associates because its rights were terminated by the judgment in the Eastern District of New York.

The District Court in its opinion stated: ( ).

> "While it is true that the bills of lading were not formally endorsed or assigned to plaintiff, it is clear that at all times, even before the issuance of the bills of lading, plaintiff, as the purchaser of the yet to be delivered shipment, was the beneficial owner thereof. This is underscored by the August 23 letter agreement between plaintiff, as purchaser and Tapioca Associates, as seller of the shipment. * * * Under this arrangement, even if plaintiff was not the formal holder of legal title, it was at least the equitable or beneficial owner and is entitled to maintain the action against the carrier for the loss sustained."

The Appellee could not have obtained any title from Tapioca Associates until that corporation received title and that corporation did not acquire title until it picked up the bills of lading from the shipper's bank in New York. That was long after the shipment had been made.

The law is well settled that a person suing on a bill of lading must have ownership of that bill of lading or must represent the owner.

In SURAILCO, 25 Fed.(2d) 275, Judge Learned Hand stated:

> "A much more serious question is the plaintiff's right to sue at all. He was the consignor under a contract which both sides admit was fully performed by delivering to the defendant. The title having passed, he had nothing to do but collect the contract price when it became due. In that

situation it has long been the law that the buyer-consignee has a right of action against the carrier, Lawrence v. Minturn, 58 U.S.100, and no one suggests the contrary. That the seller-consignor cannot also sue is not so well settled. The more general rule is that he cannot."

In SOYO MARU NICHIYO MARU, 89 F.(2d) 539, the Court stated:

"* * * it appears that Wellman, the libelant was a broker; that he purchased the fish meal and imported it; that the shipments were made for his account and risk upon the letter of credit which he had procured; that he paid the drafts which were drawn against the shipments and was paid in turn by Standard, having purchased the meal for sale to that corporation; that delivery was made to the corporation; that libel was filed by Wellman in behalf of all persons interested in the shipments; and that, at the trial, the libels were amended to bring in the corporation as a party. We have no doubt that, under these circumstances, the libels can be sustained. Wellman not only was the purchaser of the fish meal and the person to whom it was shipped, but he was also the assignee of the bills of lading attached to the drafts drawn against the shipments. The right of the consignee of a shipment to sue for damages, either in his own name or in the name of his principal, is well settled. (CITATIONS) And it is equally well settled that the indorsee of a bill of lading may sue for loss or damage to the goods, though he may be but an agent or trustee for others." (CITATIONS).

In AUNT JEMIMA MILLS COMPANY vs. LLOYD ROYAL BELGE, 34 Fed.(2d) 120, a libel was filed by the shipper of 2000 bags of flour under a bill of lading to the order of the shipper. The bill of lading was endorsed to Eugem M. Janssens & Company before the arrival of the vessel at the port of discharge. The District Court entered an interlocutory decree

for the libelant conditioned upon his filing proof that the consignee had authorized or ratified the suit. Judge Swan stated in his opinion:

> "It is a well recognized practice in the admiralty that the agent of an absent owner of cargo may assert in his own name his principal's right of action. (Citations). * * * Consequently, the libel was sufficient as a pleading and the objection relates only to a failure to prove at the trial that the libellant had a real interest or represented a real interest in the suit. * * *
>
> "Undoubtedly, an agent's unauthorized act in filing a libel for absent owners may be subsequently ratified by them and proof of such ratification made before the decree is entered will be sufficient. Houseman vs. Cargo of the North Carolina, 40 U.S. 40, 49. But this is very different from saying that without any proof whatever of the agent's authority, a decree may be entered against the carrier.
>
> * * *
>
> Accordingly the decree must be reversed. However, we do not think it is necessary to dismiss the libel and require the libellant to start again from the beginning. If libellant shall make proof of its authority to maintain the suit on behalf of the endorsee of the bills of lading, the issues may be reconsidered without reference to the court's previous findings. In other words, we direct that the suit be treated as though there had been a continuance to enable the libellant to introduce further evidence, that the respondent be allowed to introduce additional evidence to meet any phase of the libellant's case, that the libellant be allowed to offer evidence in rebuttal, if it so desires, and that the issues be then determined de novo without regard to the previous findings upon the merits.

In M.W.ZACK METAL CO. vs. THE S.S.BIRMINGHAM CITY, 291 F.(2d) 451, 453 (2nd Cir.1961) the nature and extent of the plaintiff's title and how that title was acquired is not stated in the opinion. An examination of the record in that case does not disclose the documents of title but in the brief of the libellant-appellant it is stated that the goods were sold C.I.F. and it was claimed that in the C.I.F. sale title of the goods passed to the buyer on appropriation of the goods to the common carrier.

The Court did state:

> "At no time did any of the parties in the somewhat disconnected chain of title challenge the fact that libellant was the beneficial owner of the steel. Indeed, when its right to maintain this action was questioned, libellant obtained from Framen Steel Supply Company, Inc. and from Schwabach & Co. assignments of any claim they might have against respondents for damage to the steel in question. In view of these facts we think that, irrespective of niceties of 'title,' libellant was clearly the beneficial owner of the steel shipped on respondent's vessel, and as such was entitled in its own right to maintain this action for damages.

In that case the libellant had or represented the legal title. There was no legal title not represented.

In this case the sale was ex-dock. It was treated as such by the parties. The suit was brought by the owner of the bills of lading and all of its rights against the Appellant for failure to perform its duties under the bills of lading were

terminated by that suit. The Appellee could acquire no right against the Appellant from Tapioca Associates. There was no other source from which the Appellee could acquire the right to sue the Appellant.

POINT IV

THE LETTER OF AUGUST 23, 1972 DID NOT GIVE THE APPELLEE TITLE TO THE GOODS PRIOR TO DELIVERY ON THE DOCK

The term "ex-dock" is set forth in 10 Williston on Contracts, 3rd Edition, Sec.1080-A, page 115 as follows:

(VI) EX DOCK

"Ex Dock (named port of importation)."

Under this term, seller quotes a price including the cost of the goods and all additional costs necessary to place the goods on the dock at the named port of importation, duty paid, if any.

Under this quotation:

Seller must

(1) provide and pay for transportation to named port of importation;

(2) pay export taxes, or other fees or charges, if any, levied because of exportation;

(3) provide and pay for marine insurance;

(4) provide and pay for war risk insurance, unless otherwise agreed upon between the buyer and the seller;

(5) be responsible for any loss or damage, or both, until the expiration of the free time allowed on the dock at the named port of importation;

(6) pay the costs of certificates of origin, consular invoices, legalization of bill of lading, or any other documents issued in the country of origin, or of shipment, or of both, which the buyer may require for the importation of goods into the country of destination and, where necessary, for their passage in transit through another country;

(7) pay all costs of landing, including wharfage, landing charges, and taxes, if any;

(8) pay all costs of customs entry in the country of importation;

(9) pay customs duties and all taxes applicable to imports, if any, in the country of importation, unless otherwise agreed upon.

Buyer must

(1) take delivery of the goods on the dock at the named port of importation within the free time allowed;

(2) bear the cost and risk of the goods if delivery is not taken within the free time allowed.

The only modification was in reference to Buyers undertaking to place the goods under its blanket marine policy in which it provided: (Ex.7 -93a

"National Starch & Chemical Company will bind all risk coverage under their open marine and warrisk insurance policy to include American Institute Clause from warehouse to warehouse for the above shipment on declaration of ex-dock value. In the event of loss due to marine or warrisk peril resulting in non-delivery Tapioca Associates will be paid vs. shipping documents."

The provision about non-delivery is intended to apply to a total loss only. Th e contract itself provided

"No arrival - no sale."

There was no intention to pass title prior to the delivery on the dock. In fact, Tapioca Associates performed all of the duties which they undertook under the contract except to cover the shipment with marine and war risk insurance. It entered the goods in Customs as the owner and importer. It never delivered the bills of lading to the Appellee but delivered them to the carrier.

POINT V

THE PHYSICAL DAMAGE SUFFERED BY THE CARGO WAS DUE TO INADEQUATE PACKAGING

Mr. Miller, testifying as a witness for the Appellee, said there were 25 bags in each pallet; there was fiberboard covering on all four sides and they were secured together and to the pallets by glue. (41a)

> "They were glued to the pallet and to each other all the way up to make a monolithic block."

Mr. Miller saw the cargo for the first time in Philadelphia, when part was on the pier and part still in the holds.

Mr. Horger, a surveyor, and witness for the Appellant testified: (65a).

> Q You say there was fiberboard on top and two sides ?
> A Yes, sir.

Q What about the other sides ?
A There was a slight overlap from the top of several inches, but basically the two sides were exposed.

Q Were these bags in any way secured within the pallets ?
A There was no unitizing of the bags to the pallets.

* * *

Q Was there any room in these pallets for cargo to shift with the rolling and pitching of the ship ?
A In so much as the bags are not secured to the pallet and the pallet can assume the angle of the vessel while she is rolling perhaps thirty or forty degrees with six or seven second snaps, it is my opinion that the pallet at that angle there is nothing to keep bags from going adrift of the pallet or moving from the pallet in so much as they are not secured to the pallet.

* * *

Q Were any of them protruding from the pallet when you examined them ?
A Yes, sir, many were telescoped, the entire six tiers of bags were leaning from the pallet.

* * *

In reference to the difficulty he said: ( )

"There was no glue apparent either in the remaining bags in the vessel or on the bags that I surveyed in the pier shed."

The statement of their surveyor, Theodore B.Helprin, Inc. was in the record. It also appears in Mr. Helprin's survey

report which was attached to the Appellee's answers to interrogatories. It reads as follows: (13a)

> "Our examinations revealed the shipments to consist of the normal 6 ply kraft paper bags, machine sewn over reinforcing tape at the top and bottom with each bag weighing 100 pounds net.
> "The bags were originally stacked on pallets in 6 tiers of 4 bags each leaving an open space in the center in which an additional bag was placed. Each pallet load, therefore, consisted of 25 bags.
> "The pallets were satisfactorily constructed of 1"x 3" and 2 3/4" x 3" lumber. The palletized units measured 48" x 48" x 48" and were covered with double-faced corrugated fiberboard on the tops and two sides. The other 2 sides were partly covered at the top. Each palletized unit had the bags secured horizontally with two 5/8" plastic straps."

The Court in its opinion seems to hold that the pallets were open on two sides. They were not glued together but that because a previous shipment so palletized was undamaged, the packaging was adequate. The court said: (125a)

> "The defense of inadequate packaging does not affect plaintiff's claim of nondelivery; it only relates to the claim for damage to delivered goods. Plaintiff's and defendant's witnesses differed as to whether the palletized tapioca was covered on the top and all four sides with fiberboard, whether there were vertical posts at the four corners of the pallet, and whether the bags of tapioca were glued to each other and to the floor of the pallet. Photographs admitted into evidence support the defendant's position that two sides of most pallets were substantially exposed, although all edges were protected by fiberboard. But even accepting this fact, and assuming that the pallets did not have posts at each corner and that the bags were not glued in any way, it does not follow that the packing was inadequate.

> The defendant's witness, a marine surveyor, testified that shippers of tapioca at the time alternated between a four-sided package and a two-sided package, and that he had seen other shipments packed the same way that outturned without damage. There was a lack of competent proof that the manner of packing was the cause of the damage."

There is no doubt that this vessel experienced heavy weather causing it to roll and pitch and that bags of tapioca did slip out of the pallets causing damage. This is very strong evidence that this damage was due to improper palletization or packaging. The mere fact that a previous shipment so packaged was undamaged is not conclusive. We do not know what the weather conditions were on that voyage or any of the other conditions involved. We do know that in this case the bags did slip out of the pallets and did sustain damage. The amount of this damage was $3,148.08.

POINT VI

THE APPELLEE HAS NO CAUSE OF ACTION IN THE CONTRACT OR IN TORT AGAINST THE APPELLANT

The bills of lading constituted the contract of transportation between the shipper, Thai Tapioca, Ltd. and the Appellant. They were negotiable instruments, symbols of the goods and represented the title to the goods. The Appellee never had the bills of lading, was never a party to the contracts contained in them.

The Appellee has no cause of action in tort against the Appellant. Assume that the HERMIONE was in collision with another ship and that other ship was at fault, either in whole or in part, and that cargo was damaged by that collision. If this occurred before Tapioca Associates picked up the bills of lading from the bank, a cause of action for this damage would be with the shipper, Thai Tapioca, Ltd. because it was at that time the owner of the goods. If the collision occurred after Tapioca Associates, Inc. picked up the bills of lading from the shipper's bank, then the cause of action would be in Tapioca Associates because at that time they were the owner and holder of the bills of lading and owner of the goods.

As the Appellee never became the owner of the goods it has no right of action for this physical damage no matter when it occurred.

The shortage in this case was substantial. It must have occurred on the docks at Bangkok because it was not lost in transit. Any cause of action for the loss of these goods prior to their being loaded on the HERMIONE is in the shipper.

The Appellee has no right to sue on behalf of Tapioca Associates, Inc. because its rights were terminated by the judgment in the Eastern District of New York as hereinbefore described.

CONCLUSION

It is respectfully submitted that the judgment of the District Court should be reversed and the complaint dismissed.

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Brief

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DATED:

SEP 10 1975

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